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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PAUL HARRISON,

Plaintiff and Respondent,

v.

THERMARK HOLDINGS, INC., et al.,

Defendants and Appellants.

B224664

(Los Angeles County
Super. Ct. No. BC426195)

APPEAL from an order of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Reversed.

The Law Offices of Amir M. Kahana, Amir M. Kahana and Eileen M. Horschel, for Defendants and Appellants.

Taylor Sethi Lachowicz, Matthew D. Taylor and Rahul Sethi, for Plaintiff and Respondent.

Defendants and appellants TherMark Holdings, Inc. (Holdings) and TherMark, LLC (LLC) (collectively TherMark) appeal from the April 20, 2010, order dismissing as a Strategic Lawsuit Against Public Policy (SLAPP) the third and fourth causes of action of TherMark's cross-complaint against plaintiff and respondent Paul Harrison.¹ TherMark contends (1) the dismissed causes of action were not based on "protected activity" within the meaning of the anti-SLAPP statute (Code Civ. Proc., § 425.16);² (2) TherMark has shown a reasonably probability of success on its cross-complaint; and (3) the lawsuit is not precluded by Civil Code section 47, subdivision (b), known as the "litigation privilege." We conclude the third and fourth causes of action do not arise from protected activity, and do not address the other contentions. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Harrison, an engineer, developed laser technology used in creating laser markings such as barcodes and serial numbers.³ In 1996, Harrison founded the TherMark Corporation which encompassed various other TherMark entities, including LLC, which held the patent to the technology. In September 2005, the TherMark Corporation retained Momentum Venture Management (Momentum) and its founder, Matthew Ridenour, to help the TherMark Corporation find outside investors; in exchange for these services, Momentum was to receive a management fee and, after an investor was secured, an option to purchase a specified percentage of shares of the TherMark Corporation. In November 2005, Harrison incorporated Holdings; LLC became a wholly owned

¹ The acronym "SLAPP" was coined by professors at the University of Denver and has been adopted by our Supreme Court. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1 (*Navellier*).)

² All future undesignated statutory references are to the Code of Civil Procedure.

³ Although the record on appeal does not include a copy of the complaint, we take judicial notice of it. (Evid. Code, § 452, subd. (d)(1) [judicial notice may be taken of records of any court of this state].)

subsidiary of Holdings. In 2006 and 2007, Ridenour located investors who received preferred shares of the newly formed Holdings, with a liquidation preference, in exchange for their investment.

A. *The July 2007 Separation Agreement*

By July 2007, Harrison and Ridenour were disagreeing on the management of TherMark. That month, Harrison was removed as Chief Technology Officer and Secretary of Holdings, although he remained on the board of directors. Harrison signed a Separation Agreement and Mutual Releases (the 2007 separation agreement), pursuant to which TherMark agreed to pay a monthly consulting fee to a company owned by Harrison and to maintain life insurance for Harrison through January 2008. The 2007 separation agreement included mutual releases for “any and all claims to date,” waived the parties’ rights under Civil Code section 1542 (release of unknown claims), and an agreement not to initiate any proceedings of any kind “pertaining to [Harrison’s] employment with TherMark.”

B. *The April 2008 Consulting Agreement*

In April 2008, Harrison and his company entered into another agreement with TherMark (the 2008 consulting agreement). Pursuant to that agreement, Holdings and LLC retained Harrison’s company “to advise [TherMark] on various technical and other matters relating to [TherMark’s] business.” All of these services were to be performed by Harrison, who was to report directly to TherMark’s President and CEO. In exchange, TherMark agreed to pay Harrison’s company \$10,000 per month.

Paragraph 6(d) of the 2008 consulting agreement reads: “By his execution and delivery of this Agreement, Harrison hereby further acknowledges and agrees in favor of [TherMark] as follows: [¶] (d) That Harrison has no present . . . known or unknown claims of any kind whatsoever against [TherMark] or any of their respective officers and directors, employees, representatives, agents, successors and/or assigns which have not

been previously paid or released pursuant to the applicable provisions contained in [the 2007 separation agreement] among some of the parties to this Agreement.”

C. *The Complaint*

In November 2009, Harrison brought the instant action against TherMark, among others, for breach of fiduciary duty, negligent misrepresentation, attorney malpractice, violation of California Corporations Code, section 309, breach of contract, deceit and conversion. The complaint alleges that Harrison executed the 2008 consulting agreement under duress inasmuch as he was told TherMark “would be managed into liquidation unless he went along with [appellants’] plans. Fearing the complete destruction of his life’s work and primary asset, Harrison reluctantly executed the agreement.”

D. *The Cross-Complaint*

In March 2010, TherMark filed a cross-complaint against Harrison which alleged five causes of action: (1) breach of fiduciary duty; (2) breach of contract; (3) intentional misrepresentation; (4) negligent misrepresentation; and (5) declaratory relief (the cross-complaint). The claims involved in this appeal – the third and fourth causes of action for intentional and negligent misrepresentation – alleged that Harrison induced TherMark to enter into the 2008 consulting agreement by representing that he had no known or unknown claims against TherMark which had not been previously paid or released by the 2007 settlement agreement; the representation was either false or Harrison had no reasonable basis for believing it to be true.

E. *The SLAPP Motion*

Harrison responded to TherMark’s cross-complaint with a SLAPP motion to strike the third and fourth causes of action. Harrison argued that the challenged causes of action arose from Harrison’s filing of the complaint, a protected activity under section 425.16, subdivision (b)(1) [“any act . . . in furtherance of the person’s right of petition”], as well as under the so-called litigation privilege (see Civ. Code, § 47).

TherMark countered that the basis of those causes of action was not the filing of the lawsuit in 2009; rather, it was the misrepresentations Harrison made in 2008 to induce TherMark to enter into the 2008 consulting agreement.

The trial court agreed with Harrison. Following a hearing on April 20, 2010, it granted his SLAPP motion and dismissed the third and fourth causes of action of the cross-complaint, finding both “fall within the purview of the anti-SLAPP statute, and [TherMark has] failed to effectively show that there is a probability that [it] will prevail on the intentional and negligent misrepresentation causes of action in light of the litigation privilege of Civil Code section 47(b).”

TherMark filed a timely notice of appeal.

DISCUSSION

A. Standard of Review

Whether the anti-SLAPP statute applies because the cause of action arises out of a defendant’s (or cross-defendant’s) protected acts and whether the plaintiff (or cross-complainant) has shown a reasonable probability of success at trial are both legal questions which we review independently on appeal. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 961 (*Seltzer*); *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214 (*Graffiti*); *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 906 (*GeneThera*); *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1263, 1262 (*Neville*); *Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519 (*Ramona*); *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670 (*Peregrine*).)

B. The Third And Fourth Causes of Action Are Not Based on Protected Activity Under the Anti-SLAPP Statute

TherMark contends the dismissed causes of action do not arise from “protected activity” under the anti-SLAPP statute because they are based on alleged misrepresentations Harrison made in 2008 to induce TherMark to enter into the 2008

consulting agreement, not the filing of the lawsuit in 2009. Harrison does not dispute that any representations he made in 2008 do not constitute protected activity. (See e.g. *Delois v. Barrett Block Partners* (2009) 177 Cal.App.4th 940, 955 [act of entering into settlement agreement when no litigation was pending was not protected activity].) He maintains, however, that the true gravamen of TherMark's dismissed claims is that Harrison filed this action, which is a protected activity. We conclude that the basis of the dismissed third and fourth causes of action are alleged misrepresentations Harrison made in 2008 in connection with the negotiation and execution of the 2008 consulting agreement; as such, those causes of action are not based on any protected activity and the trial court therefore erred in granting Harrison's anti-SLAPP motion.

Section 425.16 is intended to curtail lawsuits brought primarily to chill the valid exercise of freedom of speech and petition for redress of grievances and to encourage participation in matters of public significance.⁴ It establishes a two-step process for determining whether a cause of action is subject to a special motion to strike. First, the trial court decides whether the challenged cause of action arises from a protected activity under the statute (i.e. any act in furtherance of the defendant's right of petition or free speech). Only if the court finds such a showing has been made does it move on to the second step, which requires it to determine whether the plaintiff has demonstrated a probability of prevailing on his or her claim. (§ 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75 (*Cashman*); *Seltzer, supra*, 182 Cal.App.4th at pp. 960-961; *Graffiti, supra*, 181 Cal.App.4th at

⁴ In pertinent part, section 425.16 provides: "(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition . . . shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. [¶] . . . [¶] (e) As used in this section, 'act in furtherance of a person's right of petition . . . includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, . . .'"

p. 1217; *GeneThera*, *supra*, 171 Cal.App.4th at pp. 906-907; *Neville*, *supra*, 160 Cal.App.4th at p. 1261; *Peregrine*, *supra*, 133 Cal.App.4th at p. 669.) Only a cause of action that satisfies both prongs is a SLAPP, subject to being stricken. (*Navellier*, *supra*, at p. 89.) Whether the plaintiff had a subjective intent to chill free speech or the right to petition and whether free speech or the right to petition were actually chilled are both irrelevant. (*Cashman*, at pp. 74-75.)

In the context of the anti-SLAPP statute, the phrase “ ‘arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech.” (*Cashman*, *supra*, 29 Cal.4th at p. 78; *Seltzer*, *supra*, 182 Cal.App.4th at p. 961; *Graffiti*, *supra*, 181 Cal.App.4th at p. 1216.) It is the gravamen of a cause of action which determines whether the anti-SLAPP statute applies. When allegations of unprotected activity are only incidental to a cause of action based on protected activity, the collateral references to unprotected activity does not obviate application of the anti-SLAPP statute. (*Ramona*, *supra*, 135 Cal.App.4th at p. 519.) Conversely, a cause of action that is based on unprotected activity but includes incidental reference to protected activity is not subject to a special motion to strike. (*Peregrine*, *supra*, 133 Cal.App.4th at p. 672.)

“[T]hat a cause of action arguably may have been ‘triggered’ by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant’s protected free speech or petitioning activity. [Citations.]” (*Navellier*, *supra*, 29 Cal.4th at p. 89; *Graffiti*, *supra*, 181 Cal.App.4th at pp. 1217-1218; *Peregrine*, *supra*, 133 Cal.App.4th at pp. 669-670.) In *Graffiti*, the court explained that there is a distinction “between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity.” (*Graffiti*, at pp. 1214-1215.) The latter is a SLAPP suit, the former is not.

Cashman provides a good example of these rules. There, mobile park owners filed suit against the City of Cotati in federal court in which the owners challenged a local ordinance. Concededly in response to the federal action, the city filed a state court action

“to gain a more favorable forum in which to litigate the constitutionality” of the ordinance. (*Cashman, supra*, 29 Cal.4th at pp. 72-73.) The trial court concluded the state court suit was a SLAPP as it was filed in response to, and hence arose from, the federal action. The Supreme Court reversed, holding that the city’s lawsuit legally “arose from” not the earlier litigation but the parties’ underlying dispute over the constitutionality of the statute. (*Id.* at pp. 79, 81.) Applying *Cashman*’s reasoning, we conclude that the third and fourth causes of action in the cross-complaint here did not arise out of the protected activity of Harrison’s underlying complaint, but legally arose out of the non-protected activity of misrepresentations claimed to have been made in connection with the 2008 consulting settlement agreement.

The elements of a cause of action for intentional misrepresentation are: “(1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. [Citation.] The same elements comprise a cause of action for negligent misrepresentation, except there is no requirement of intent to induce reliance. [Citation.]” (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

Here, the cross-complaint’s third cause of action alleges that Harrison falsely represented that he had no “known or unknown claims of any kind whatsoever against [TherMark] which have not been previously paid or released pursuant to” the 2007 Settlement Agreement, with the intention of inducing TherMark to enter into the 2008 consulting agreement and that, in reliance on those representations, TherMark entered into the 2008 consulting agreement; the fourth cause of action alleges Harrison made the representation without any reasonable basis for believing it to be true. The cross-complaint contains just one reference to Harrison filing the underlying complaint: in paragraph 14 of the introductory portion of the cross-complaint, under the heading “Harrison’s Misrepresentation,” the cross-complaint alleges: “This Misrepresentation [that Harrison had no known or unknown claims] was false. After Harrison was paid under the Consulting Agreement, he brought claims against TherMark that predated the

Consulting Agreement.” Although paragraph 14 is incorporated by reference into the third and fourth causes of action, neither cause of action specifically identifies Harrison’s filing of the complaint as any element of the cause of action, including damages.⁵ Thus, the allegations of the cross-complaint demonstrate that the gravamen of the third and fourth causes of action are Harrison’s alleged misrepresentations, not his filing of the complaint. The paragraph 14 reference to Harrison filing the complaint is incidental to the essence of the third and fourth causes of action, set forth to demonstrate the falsity of the representations.

Benasra v. Mitchell, Silberberg & Knupp LLP (2004) 123 Cal.App.4th 1179 (*Benasra*) is also instructive. In that case, the issue was whether attorney malpractice, consisting of a breach of the duty of loyalty (i.e. accepting representation of an adverse interest), involved protected activity.⁶ The court concluded that it did not because a breach of loyalty occurs once an attorney accepts the adverse representation, which is not a protected activity; evidence that confidential information was later used against the client in litigation would help support damages, but is not the basis of the claim. (*Id.* at p. 1189; but see *Peregrine, supra*, 133 CalApp.4th at p. 674 [questioning *Benasra*’s focus on the time a breach of duty occurs and observing that § 425.16 applies to a “cause of action,” which includes the element of damages].)

⁵ The damages alleged in the third cause of action are that, “As a direct and proximate result of the misrepresentations of Harrison, which were intended to induce TherMark to enter into the Consulting Agreement with Harrison, and which did, in fact, have that intended effect, TherMark has been damaged in an amount not fully known at this time.” The damages alleged in the fourth cause of action are that TherMark relied on Harrison’s misrepresentations to its detriment and “[a]s a direct result of the Misrepresentation, TherMark has been damaged in an amount to be proved at trial.”

⁶ The elements of a cause of action for legal malpractice are: (1) breach of the attorney's duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a proximate causal connection between the negligent conduct and the resulting injury; and (3) actual loss or damage resulting from the negligence. (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661.)

Under the reasoning of *Cashman* and *Benasra*, in this case the alleged fraud occurred when TherMark entered into the 2008 consulting agreement in reliance on Harrison's false representation. The expenses TherMark incurs defending against the action may be an element of damages, but are not the basis of the claim. Accordingly, the claims for intentional and negligent misrepresentation do not arise out of any protected activity, and the trial court erred in granting Harrison's motion to strike.

Harrison's reliance on *Navellier, supra*, 29 Cal.4th 82, for a contrary result is misplaced. In that case, the plaintiff and defendant were engaged in federal litigation when the defendant executed a general release in favor of the plaintiff which only partially settled the lawsuit. After executing the release, the defendant filed counterclaims against the plaintiff in the federal action. The plaintiff both defended against the counterclaims in the federal action on the basis of the release and also filed a state court action against the defendant for fraudulent inducement (i.e. intentional misrepresentation) and breach of the release agreement. Our Supreme Court concluded that the defendant's acts of negotiating and executing the release, the basis of the fraudulent inducement cause of action, fell within the ambit of the anti-SLAPP statute because it "involved 'statement[s] or writing[s] made in connection with an issue under consideration or review by a . . . judicial body' (§ 425.16, subd. (e)(2)), i.e., the federal district court" (*Navellier, supra*, at p. 90.) The act of filing counterclaims in the federal action, the basis of the breach of contract cause of action, fell within the ambit of the anti-SLAPP statute inasmuch as "arguments respecting the Release's validity were 'statement[s] or writing[s] made before a . . . judicial proceeding.' (*id*, subd. (e)(1)), i.e. the federal action." (*Ibid.*) The critical fact distinguishing *Navellier* from this case is that here, the acts of negotiating and executing the 2008 consulting agreement did not occur in the context of ongoing litigation; no judicial proceeding was involved.

Because we have found Harrison has not met his burden on the first prong, we need not address the second prong. (*Graffiti, supra*, 181 Cal.App.4th at p. 1211.)

DISPOSITION

The order striking the third and fourth causes of action of the cross-complaint is reversed. TherMark shall recover costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.